1949

# Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Appellant's Petition for Rehearing and Brief

Utah Supreme Court


Skeen, Thurman & Worsley; Attorneys for Appellant;
Fisher Harris; Amicus Curiae;

7189

Case No. 7189

# In the Supreme Court of the State of Utah

LEHI IRRIGATION COMPANY,
*Plaintiff and Appellant,*

vs.

CLARENCE T. JONES and ED. H. WATSON, State Engineer of the State of Utah,
*Defendants and Respondents*

## APPELLANT'S PETITION FOR REHEARING AND BRIEF



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FISHER HARRIS,
*Amicus Curiae*

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*Plaintiff and Appellant,*

vs.

CLARENCE T. JONES and ED. H. WATSON, State Engineer of the State of Utah,
*Defendants and Respondents*

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## PETITION FOR REHEARING

Comes now the appellant and respectfully prays the court to grant a rehearing of this cause on the following grounds, namely:

1. The court has fallen into serious and fundamental error in its statement that certain letters of the State Engineer are the "very foundation of this appeal, and the trial de novo in the district court," whereas the appeal is founded on the facts and their legal effect—the findings of fact, conclusions of law and decree of the District Court, and neither the said

letters or any part of them are either relevant or material in any sense or degree whatever.

2. The court has fallen into fundamental error in holding the decision controlled by the pronouncements of this court in Little Cottonwood Water Company vs. Kimball, 76 Utah 243, 289 P. 116, whereas they were stated as the effect of a statute different from that in force at the time of and controlling in this cause.

3. The court has fallen into fundamental error in finding that the waters in question are those within the scope of the approved application 12144 of the United States and nevertheless holding them subject to appropriation by Respondent.

4. The court has fallen into serious and fundamental error in holding that as between the owner of an approved application for right to the use of water and a subsequent applicant for right to use from the same source, the burden is upon the one prior in time and right to establish interference or conflict by the latter rather than the contrary as required by Section 8, Chapter 3, Title 100, Utah Code Annotated 1943.

5. The court has fallen into serious and fundamental error in holding, contrary to the former decisions of this court, that one who seeks to appropriate water from or near the source of supply of one with prior rights to use from that source has not the burden of proving no interference.

6. The court has fallen into fundamental error in failing and refusing to decide whether under the facts found and before it and the issue so made and argued, the waters in question are or are not the subject of appropriation.

7. The court has fallen into serious and fundamental

error in stating, "There are no vested rights with which this application will interfere—at least no such rights are called to attention of the court," when as a matter of fact the attention of the court was expressly called to the vested rights of the United States "totally irreconcilable with approval of the Jones applications."

SKEEN, THURMAN & WORSLEY,
*Attorneys for Appellant.*

Skeen, Thurman and Worsley, Attorneys for Appellant, and D. A. Skeen, a member of the firm, do hereby certify that in their opinion there is good reason to believe that the judgment of the court herein is erroneous and that the cause ought to be re-examined.

SKEEN, THURMAN & WORSLEY and
D. A. SKEEN.
*Attorneys for Appellant.*

I join in the foregoing application and certificate.

FISHER HARRIS,
*Amicus Curiae*

## BRIEF

1. The court has fallen into serious and fundamental error in its statement that certain letters of the State Engineer are the "very foundation of this appeal, and the trial de novo in the district court," whereas the appeal is founded on the facts and their legal effect—the findings of fact, conclusions of law and decree of the District Court, and neither the said letters or any part of them are either relevant or material in any sense or degree whatever.

The letter of the State Engineer, fifty-seven lines of which are quoted in the opinion of the court, gives the reasons in response to which he approved the Jones applications. But this is not an appeal from the decision of the State Engineer; this is an appeal from the decision of the Fourth District Court which on appeal from the decision of the Engineer tried the cause de novo, and even if that were not so—even if the cause were now before the District Court the "opinion" of the Engineer would be of no more consequence—no more nearly the "very foundation of the case"—than the opinion of a Justice of the Peace or Judge of a city court in a case on trial de novo before the District Court.

The facts found to be such by the District Court, those which are known by the court as such, its conclusions and decree are the "very foundation of this appeal," and neither the letter quoted or any part of it is either relevant or material in any sense or degree to the appeal.

What weight was given by this court to the letter quoted from at considerable length cannot be objectively determined, but it is necessarily inferable that it materially affected its decision.

If it had been proper to notice and to comment upon the letter of the Engineer it would have been appropriate to notice and determine the effect of the fact that he, like the trial court, gave no consideration to the rights of the United States; both asserting in effect that which counsel for Respondent Jones and the Attorney General again and again asserted explicitly, namely that "this is a private law suit between two

small water users" and so that the interests and rights of the "Deer Creek Project" not only had not been considered, but ought not to have been.

It was this which was characterized by Amicus Curiæ as "utterly and obviously frivolous," he suggesting in response that the case ought to be "remanded in any event, so that, at least, there shall be same approach to compliance with the real essence of the law."

2. The court has fallen into fundamental error in holding the decision controlled by the pronouncements of this court in Little Cottonwood Water Company vs. Kimball, 76 Utah 243, 289 P. 116, whereas they were stated as the effect of a statute different from that in force at the time of and controlling in this cause.

In the first place, what was said in Little Cottonwood Water Company vs. Kimball, and so often since, in relation to the duties of the State Engineer, was pure dictum, for the court having decided that water lost by seepage and evaporation from an open ditch was the subject of appropriation by one who proposed to save it, there was a clear and indisputably affirmative showing of unappropriated water, and there was no occasion whatever for a lengthy or any dissertation at all upon the duty of the Engineer in a doubtful case.

Passing that, however, the statute interpreted in the majority opinion was of very different effect from that which is applicable to the facts of this case.

The fact of this difference was called to the attention of the court by Amicus Curiae in his original brief, page 11:

"The statute makes it of the very essence of approval, that there be found to be '*unappropriated* water in the proposed source,' and, whether before the State Engineer or the District Court, if there is nothing from which that fact may be determined the application must be rejected, for the sufficient and simple and compelling reason that the fundamental prerequisite to approval is lacking.

"The necessary implications of the statute are so obvious that anything aditional must be superogatory; nevertheless it is significant that prior to amendment by the legislature in 1939 Section 8 of Chapter 3, Title 100 read, 'When there is no unappropriated water in the proposed source of supply it shall be the duty of the State Engineer to reject such application.' Then, 'Under the language of the statute' as Chief Justice Cherry pointed out in Little Cottonwood Water Company vs. Kimball at page 248 of 76 Utah, 'it is (was) not a prerequisite to the approval of an application that the State Engineer find affirmatively that there is unappropriated water in the proposed source. The proposition is stated in the negative, and it is only when there is no unappropriated water in the proposed source that the application is to be rejected.' It is quite otherwise as the Legislature provided in 1939, and, for reasons which will at once occur, far better."

The reasons which it is said "will at once occur" are these:

Prior to the amendment of the section the water resources of the state being relatively undeveloped, it was proper that applications for right to appropriate should be approved unless there was showing of "no unappropriated water in the proposed source," while since the date of the amendment, and the occasion for it, the fact has been that indiscriminate

approval of applications has been more likely to disturb and disrupt the exercise of rights already acquired rather than to lead to further development of water resources.

No notice was taken by this court of what was said in this regard, and so far as we know no notice has ever been taken by this court of the fact and effect of the amendment of Section 8 of Chapter 3 of Title 100 of the Code. Those who have been familiar with the course of legislation on the subject, and who in some measure have influenced it, are of course aware of the purpose of the amendment, but objectively its purpose is quite obvious. We submit that it unequivocally directs a different statement than that made by Chief Justice Cherry in Little Cottonwood Water Company vs. Kimball, and that it clearly directs a result the very opposite of that announced by this court in the case of Lehi Irrigation Company vs. Jones. The statute as amended will not permit in support of its decision what the court said in this case: "It is not clear that there is no unappropriated water," for under the statute the Jones applications may only be approved upon a finding that there "is unappropriated water in the proposed source."

3. The court has fallen into fundamental error in finding that the waters in question are those within the scope of the approved application 12144 of the United States and nevertheless holding them subject to appropriation by Respondent.

4. The court has fallen into serious and fundamental error in holding that as between the owner of an approved application for right to the use of water and a subsequent applicant for right to use from the same source, the burden is upon the one prior in

time and right to establish interference or conflict by the later rather than the contrary as required by Section 3, Chapter 8, Title 10, Utah Code Annotated 1943.

5. The court has fallen into serious and fundamental error in holding, contrary to the former decisions of this court, that one who seeks to appropriate water from or near the source of supply of one with prior rights to use from that source has not the burden of proving no interference.

These three assignments we think may be discussed as one. The court has found that the exchange application No. 12144 of the United States filed with the State Engineer on April 3, 1936, is before the court and that its effects must be considered in relation to the applications in question. The waters the subject of the Jones applications have been definitely determined to be those covered by No. 12144, but this court, approving the Jones applications nevertheless, has done so on the theory that it is possible that the 30,000 acre feet covered by the exchange application may be recovered without recourse to the springs arising by use of the Deer Creek water. In other words, it has cast upon the United States the burden of proving, in each instance, that the waters found to be developed by its efforts are essential to the exercise of rights granted to it more than 12 years ago to recover them.

In this it has ignored the effect of the statute referred to and has held that as between the owner of an approved application for right to the use of water and a subsequent applicant for rights to use from the same source, the burden

is upon the one prior in time and right to establish interference or conflict, rather than the contrary. Not only is the result in conflict with the clear purpose and effect of Section 8 of Chapter 3 of Title 100, Utah Code Annotated, 1943, but it is in conflict with the rule in the analogous situations presented by Peterson vs. Wood, 71 Utah 77, 262 P. 828; Bastian vs. Nebeker, 49 Utah 390, 163 U. 1092, and Mountain Lake Mining Company vs. Midway Irrigation Company, 47 Utah 346, 149 P. 929, by which the burden of proof has been definitely placed upon him who seeks to appropriate water from or near the source of supply of one with prior rights to use from that source, to show by clear and convincing evidence that there will be no interference.

The effect of thus shifting the burden of proof is such as to make the rights of the United States under its application 12144 impossible of exercise, for in every case and whatever the form of action might be, every claimant in the situation of Jones would urge what this court has said in this case.

The result is utterly impracticable, as well as unconscionable against the prior right—unconscionable because there is no equity in favor of the applicant in such case.

The waters in question result from an appropriation made from a foreign watershed, and thus have been saved from wastage into Great Salt Lake; they have been stored in a reservoir constructed to receive and store them; they have been reduced to actual possession by the United States as an essential part of the water supply of a great reclamation project. In

practical effect they have been created. As early as 1936 the United States gave notice that once used they would be recovered and re-used for the benefit of an essential part of the water supply of the Provo River Project, serving some 50,000 acres of farm lands and substantially half of the population of the State of Utah; and the State of Utah has granted the United States the right to recover and reuse them, and the right so granted has been confirmed by this court. What this court has held and said in this case is totally inconsistent with and utterly destroys the effect of what was decided in Tanner vs. Bacon, State Engineer, 103 Utah 494.

6. The court has fallen into fundamental error in failing and refusing to decide whether under the facts found and before it and the issue so made and argued, the waters in question are or are not the subject of appropriation.

"We are not prepared to render an adjudication upon the record that is before us, and thus possibly determine ultimate rights at this time, but will reserve these matters until a proper case brings the issue before us . . . . We are reluctant to decide so important a problem as an initial matter without having the benefit of proceedings, arguments and parties, who may be adversely affected, to aid us in its determination."

Amicus Curiæ in his final brief, after reciting the facts, said this: "If those facts are of no legal effect noticeable upon application to appropriate the waters so realized, how can this court avoid saying so? And if they are—if under those facts those waters are not subject to appropriation without

showing abandonment by their creator, how can this court avoid saying *that?*"

The court has answered these questions very simply and clearly by saying in effect: "We accomplish the avoidance of these questions by declining to consider them." This question is reserved "until a proper case brings the issue before us."

The issue is clearly before the court now, and in a case as "proper" and appropriate as it is possible to conceive. The fact that the waters sought to be appropriated by Jones have been brought from a foreign watershed and that they are the result of the use of those waters from storage in a reservoir constructed to impound them, has been found as a fact by the trial court. The facts are indisputably established and their legal effect has been asserted on one side and controverted on the other.

How can this or any other matter, important or not, be decided other than "initially"? The court already has "the benefit of proceedings." It already has the "arguments;" and it has before it the "parties who may be adversely affected."

As to "parties who may be adversely affected," as we have pointed out before, there is no other party, certainly not Respondent Jones, in behalf of whom any *equity* may be urged.

The only matter to be determined is whether or not the fruits of the labor of others—in the last analysis the fruits of the labor of the stockholders and beneficiaries of the Provo River Water Users Association and of the United States, are to be conferred upon a stranger. This court either agrees or disagrees

with what was said by the federal court in United States vs. Haga, 276 Fed. 41, and approved by the Supreme Court of the United States in Ide vs. United States, 263 U. S. 497, that the result advocated here by Appellant and by Amicus Curiæ is directed by "Considerations of both public policy and natural justice."

As a matter of fact this Court has already decided, and the State Engineer has already decided, that which this Court has said in this cause it is reluctant to decide.

Approval of Application No. 12144 necessarily involved a determination of the State Engineer that the right to the use of the water the subject of the application belonged to the United States; and such a determination was also implicit in the decision of the State Engineer, the decision of the District Court and in the decision of this Court in Tanner vs. State Engineer, 103 Utah 494, for prerequisite to the right of exchange is the right to the use of the waters exchanged. The right of exchange exists as to no waters whatever except those already appropriated.

The result is that the principles, the foundation of the decisions of Ide vs. U. S. and U. S. vs. Haga, sufficient in themselves to affirm the rights of the United States, totally irreconcilable with approval of the Jones' applications, have long since been affirmed by the State Engineer and by this Court; but this Court in Lehi Irrigation Company vs. Jones, in approving the Jones' applications, while declining to pass on the question, has in effect passed upon it in an effect the very opposite to its former decision, saying at the same time that the Jones'

rights are dependent upon the filings of the United States and that he "must rely" upon them, "to secure at least a part, if not all, of the water upon which he has filed."

If it be true that the matter has not been argued sufficiently extensively, that claim may be obviated by the granting of this petition for rehearing, directed as it is on grounds independent of this question.

7. The court has fallen into serious and fundamental error in stating, "There are no vested rights with which this application will interfere—at least no such rights are called to attention of the court," when as a matter of fact the attention of the court was expressly called to the vested rights of the United States "totally irreconcilable with approval of the Jones' application."

We are unable to understand what the court has in mind unless some peculiar significance attaches to the word "vested." Are we to infer that the right of the United States as the creator of the waters in question is not vested, or that its rights under Application 12144 are not? If the latter is intended, it ought to have been said in the year 1943 in Tanner vs. Bacon, in which event the Provo River Project would probably have been abandoned. Instead of which, and in reliance upon the decision of this court and its necessary implications, some twenty millions of dollars has been expended in the construction of works utterly useless if the fundamental water

rights of the project are not vested—are subject to the jeopardy of such encroachments as are countenanced and encouraged by the decision of Lehi Irrigation Company vs. Jones.

It is respectfully and earnestly submitted that this cause ought to be re-examined.

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FISHER HARRIS
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